AUG 6 1945
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 301

BENJAMIN HALL and ALTUS HALL,
Petitioners

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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CITATION

Case:

United States v. Falcone, 311 U. S. 305 5

Statute:

Sec. 88 of Title 18 U. S. C. 2, 6

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Benjamin Hall and Altus Hall pray that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause July 11, 1945, affirming the orders and judgments of the District Court of the United States for the Northern District of Georgia which overruled petitioners' motion for a directed verdict.

ORDERS AND JUDGMENTS BELOW

The order and judgment of the court overruling petitioners' motion for a directed verdict appears in the

record at pp. 113, 136. The opinion of the Circuit Court of Appeals appears in the record at p. 149.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 11, 1945 (R. 152). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Was the evidence sufficient to authorize the conviction of petitioners; and

(2) Did the court err in admitting evidence against petitioners which had been suppressed as to a co-defendant and co-conspirator.

STATUTE INVOLVED

The statute involved is Sec. 88 of Title 18 U. S. C.; Criminal Code, Sec. 37; Revised Statute, Sec. 5440, and will be found in the Appendix, infra, p. 6.

STATEMENT

Petitioners were indicted at the March Term 1944 by a United States Grand Jury in and for the Atlanta Division of the Northern District of Georgia (R. 1). The indictment contained one count and charged petitioners with a conspiracy to violate the Internal Revenue Laws. Petitioners went to trial on the 4th day of November 1944 and the jury returned a verdict of guilty as charged (R. 8). On January 19, 1945, the court sentenced each of

petitioners to serve a sentence of two years and to pay a fine of $2000.00 each (R. 8-11).

The pertinent facts, as disclosed by the evidence, are substantially as follows:

Petitioners were engaged in the used car business in the City of Atlanta. They were jointly indicted with Harold Hefner and were charged with conspiring with him and with various co-conspirators who were not indicted. The great weight of the evidence adduced upon the trial centered around the place of business of petitioners. Various special agents of the Alcohol Tax Unit testified about things they observed around this place of business during their investigation which continued for several months. These agents testified that they never did observe any illicit whiskey or any other thing around this place of business which was *per se* criminal. They testified that they saw various and sundry automobiles and trucks go in and out of this place of business almost every hour during the days when the place was under observation. Petitioners were never apprehended and were never seen on any automobile transporting illicit liquor and were never seen commiting any illegal offense. There was no evidence to directly connect petitioners with any illegal act. All the acts of petitioners were as consistent with innocence as with guilt. Petitioners were at all times in the used car business and were trading generally in used cars and trucks.

Harold Hefner, the other co-defendant, was not tried with petitioners. The court suppressed the evidence about a large distillery which had been destroyed at Hefner's home near Atlanta. Although the evidence was suppressed

as to Hefner the court admitted the evidence about this distillery over the objection of petitioners.

At the conclusion of all of the evidence petitioners (defendants in trial court) moved for a directed verdict upon the grounds that the evidence was insufficient to warrant a conviction of petitioners or either of them. This motion was overruled (R. 113, 136). Petitioners were sentenced to pay a fine of $2000.00 each and to serve two years in prison (R. 8-10).

Upon appeal by petitioners to the Circuit Court of Appeals for the Fifth Circuit the judgment of the court below was affirmed (R. 152).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court of the United States did not err in refusing to direct a verdict for petitioners on the ground that the evidence was insufficient to warrant their conviction.

2. In holding that the District Court did not err in admitting evidence over the objection of petitioners which had been suppressed as to a co-defendant and co-conspirator.

3. In not reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The question involved is whether the evidence was

sufficient to warrant the conviction of petitioners and whether the evidence which had been suppressed as to another defendant and co-conspirator was admissible against petitioners.

One cannot be held as a member of a conspiracy upon mere proof that he had knowledge of it or negatively acquiesced in the offense. There must be active participation in the crime.

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The evidence against petitioners was of such character that it was necessary to base an inference upon an inference in order to hold that they were guilty. Petitioners were not connected with any transaction that was *per se* illegal. There is no direct evidence that they entered into a conspiracy with any person and there are no circumstances disclosed by the evidence which are sufficient to warrant the holding that there was a conspiracy existing between petitioners and other parties. The evidence was entirely too remote to authorize the conviction of petitioners. Petitioners contend that the evidence about a large distillery which was being operated near Atlanta was inadmissible against them for that the evidence had been suppressed on motion of co-defendant Harold Hefner. There is no evidence to directly connect petitioners with the operation of this distillery. They could only be guilty of active participation therein by conspiring with Harold Hefner who was operating the distillery. Since under the law the evidence could not be used against Harold Hefner, then necessarily such evidence was inadmissible against petitioners.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

JAMES F. KEMP
JOHN M. JOHNSON
Attorneys for Petitioners

APPENDIX

Section 88 of Title 18 U. S. C.; Criminal Code Sec. 37 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096.)"